BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2015010890

DECISION

Capistrano Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on January 29, 2015, naming Student. The matter was continued for good cause on February 12, 2015.

Administrative Law Judge Chris Butchko heard this matter in San Juan Capistrano, California, on May 26, 2015.

Ernest Bell, Attorney at Law, represented District. Linda Koo, Capistrano Unified School District Legal Specialist, attended the hearing on behalf of District.

No appearances were made at hearing on behalf of Student at hearing, but Student did file a closing brief.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 12, 2015. Upon timely receipt of the written closing arguments from both parties, the record was closed and the matter was submitted for decision.

ISSUES[1]

1. In the absence of a request by Student for an independent educational evaluation, may the Office of Administrative Hearings rule upon a request by District to find its assessment of Student appropriate?

2. Were the speech and language, occupational therapy, and psychoeducational functioning assessments of Student performed by District in preparation for Student's July 28, 2014 individualized education program transition meeting appropriate?

SUMMARY OF DECISION

Because there is no active controversy between the parties, any decision rendered by the Office of Administrative Hearings would be an improper advisory opinion. The withdrawal by Student of his request for independent educational evaluations mooted the issues to be heard. The Office of Administrative Hearings is without jurisdiction to rule in this matter.

FACTUAL FINDINGS

1. Student is a three-year-old male who resided in District at all relevant times. At the time at issue, Student was about to transition from an individual family service plan to an individualized educational program. District found Student to have delayed social skills and issues with visual and auditory stimuli.

2. Individualized educational program team meetings were held on July 28,

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[1] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

2014, and August 19, 2014. At Parents' request, additional data was collected and an addendum report was prepared and discussed at a meeting on October 1, 2014.

3. District received a letter from Parents on January 5, 2015, disagreeing with the "psychoeducational, communication, and occupational assessments" performed by District and requesting independent educational evaluations in those areas.

4. On January 13, 2015, Sara Young, District's Director of Informal Dispute Resolution, replied in writing to Parents' letter. Her letter stated that District believed the assessments were appropriate, met legal standards, and accurately portrayed Student's needs. District denied the request for independent educational evaluations.

5. District filed the instant action to defend the appropriateness of these evaluations on January 29, 2015.

6. The parties filed a joint request for a continuance on February 11, 2015. The request was granted, postponing the hearing date from February 23, 2015, to May 26, 2015, beginning at 1:30 p.m.

7. On May 18, 2015, Student moved to consolidate this action with another he filed that day. The request was denied on May 21, 2015.

8. The denial of the request to consolidate was based upon the Administrative Law Judge's finding that "[a]lthough the two cases are marginally interdependent, on balance the two cases require significantly different witnesses and evidence." It noted that the newly-filed case did not "challenge District's assessments or seek independent educational evaluations as a proposed resolution."

9. At approximately noon on May 26, 2015, Student's counsel sent counsel for District notification by fax and e-mail that Student was withdrawing his request for independent educational evaluations. District's counsel spoke to Student's counsel at approximately 12:30 p.m. and asked if Student would stipulate to the appropriateness of District's assessments. Student did not agree to do so.

10. At approximately 12:21 p.m., counsel for Student moved to withdraw as counsel in this matter. The withdrawal request was denied by the Office of Administrative Hearings on that date.

11. The hearing was called at 1:30 p.m. Because no representative of Student was present at that time, the start of the hearing was delayed until 2:00 p.m. No appearance was made on behalf of Student.

12. The Administrative Law Judge told District that it could choose whether or not to proceed with the presentation of evidence in light of the circumstances, but the Administrative Law Judge informed District that he had serious reservations about the Office of Administrative Hearings' ability to rule on the assessments in the absence of a request by Student for independent educational evaluations.

13. District chose to proceed.

14. At the completion of District's case-in-chief, the Administrative Law Judge stated that an order would be issued setting a schedule for final briefing and directing that the parties address the potential mootness issue.

15. The order issued on May 27, 2015. The parties were "directed to address the issue of the jurisdiction of the Office of Administrative Hearings to issue an opinion in this matter in light of the parents' informal withdrawal of all requests to have District fund independent educational evaluations."

16. Both parties submitted briefing. Parents submitted a brief on behalf of Student without representation by counsel.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)[2] et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§

[2] All subsequent references to the Code of Federal Regulations are to the 2006 version.

56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the Rowley standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §

1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (Schaffer v. Weast (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUE 1: WITHDRAWAL OF THE REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

5. District contends that the withdrawal of the request for independent educational evaluations has no effect upon the jurisdiction of the Office of Administrative Hearings. It argues that the District may initiate an action whenever there is a proposal or refusal to initiate or change the identification or assessment of a child. (Ed. Code, § 56501(a).) Additionally, District argues that its ability to initiate a due process hearing under Education Code section 56329(c) to show that its assessment is appropriate is in no way conditioned on the existence of a request by a student for an independent educational evaluation.

6. District argues that the matter is not moot because there exists a live controversy between the parties as to the assessments. District notes that the case which Student sought to consolidate with this matter is still active, and in that case the assessments at issue here were reviewed by Student's experts and used to conclude that Student needed services and supports beyond what was given in District's offers of FAPE.

7. If this proceeding is moot, according to District, it will be barred from proving that its offers constituted FAPE because it will be prevented from showing that

these assessments were appropriate. That would deprive District of its "central defense" to that action.

8. Lastly, District argues that it is Student's burden to prove that he had withdrawn his request for independent evaluations. It asserts that, other than the fact that it informed the Administrative Law Judge that Parents had withdrawn their request for independent educational evaluations, there is no evidence in the record to support a finding that they were withdrawn. In these extraordinary circumstances, District asserts, the Office of Administrative Hearings should allow an exception to the mootness doctrine to prevent Student from gaining unfair advantage from his withdrawal of the requests in his other action and to prevent strategic withdrawal and renewal of independent educational evaluation requests.

9. The IDEA grants Districts the ability to file for due process and defend an assessment when there is a request by a student for an independent educational evaluation. The IDEA provides that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation from District. (34 C.F.R. § 300.502(b)(1), (b)(2).)

10. Education Code § 56501(a) provides that a due process hearing may be

initiated under the following circumstances: (1) there is a proposal to initiate or change the identification, assessment, or educational placement of a child or the provision of a FAPE to a child; (2) there is a refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to a child; (3) the parent or guardian of a child refuses to consent to an assessment; or (4) there is a disagreement between a parent or guardian and a district, special education local plan area, or county office regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in subsection (b) of Section 300.403 of Title 34 of the Code of Federal Regulations. The Ninth Circuit has held that jurisdiction of the hearing office (now the Office of Administrative Hearings) is limited to the circumstances enumerated in the Education Code. (See *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026.)

11. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) This grants districts the power to initiate a due process action; there are other circumstances under which a district may file but none of which are relevant here.

12. District has not filed in response to a proposal or refusal to initiate or change the identification or assessment of a child under Education Code § 56501(a). That statute is not cited in District's request for due process hearing. Instead, District's request sought a ruling that the assessments were "appropriate and met the requirements of applicable state and federal law" so that District was not obligated to fund Student's independent educational evaluations.

13. District is correct in arguing that Education Code section 56329, subdivision (c) imposes no positive requirement that a student request an independent

educational evaluation before District may file to show that an assessment was appropriate. Such a claim would, however, not be heard because it would lack justiciability. If there was no request for an independent educational evaluation, there would be controversy between parties. Absent a present and actual clash of interests, there is no dispute and no incentive for an opposing party to involve itself in the litigation. (*Princeton University v. Schmid* (1982) 455 U.S. 100, 102. ["Courts do not sit to decide hypothetical issues or to give advisory opinions."])

14. The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted. (*Independent Union of Flight Attendants v. Pan American World Airways, Inc.* (9th Cir. 1992) 966 F.2d 457, 459.) No effective relief can be fashioned here. Student's request for independent educational evaluations cannot be denied because it has been withdrawn. There is no party in this matter with an interest opposed to District such that a live controversy exists.

15. The existence of the separate action between the parties gives no life to this matter. District's argument that the use of these assessments in formulating the offer of FAPE in the other case raises an issue here is unpersuasive. The FAPE offer is not relevant here and not at issue between the parties in this action. Similarly, District's argument that declining to rule here will bar it from raising some defense in the other action is unavailing. The Office of Administrative Hearings has already held that the two cases are only marginally interdependent and require a significantly different evidentiary showing. District will be not be precluded from raising any defense by a finding that this matter is moot.

16. District complains that it is in some way being punished for its good-faith reporting of Student's withdrawal of his independent educational evaluation requests. Finding this matter moot is not a negative outcome. District has succeeded in avoiding any obligation to fund independent assessments. Any contrary implication is not worthy

of consideration; clearly, District would not withhold such information from any hearing officer to gain an advantage in litigation.

17. It is possible that unscrupulous parties may seek to game the system in the manner that District fears, withdrawing requests, as here, on the cusp of hearing and then seeking to reinitiate them in a new action or by amending to a parallel matter. That is not a reason to continue this matter despite Student's withdrawal.

18. Student dropped his request for independent educational evaluations; he did not default. If Student were to seek to renew the request in a new action or by amendment in his other matter, the hearing officer in such matter would be correct to inquire why Student did not choose to proceed here. If convinced that the renewal request was not made in good faith, the hearing officer could consider sanctions for such behavior against either client or counsel.[3] That, however, is not at issue here.

19. There is no live controversy between the parties. The Office of Administrative Hearings may not rule in this matter, as it is moot.

ISSUE 2: APPROPRIATENESS OF THE ASSESSMENTS

20. Having found the matter moot, the Office of Administrative Hearings may not rule upon the appropriateness of the District's assessments.

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[3] The ability of the Office of Administrative Hearings to administer its caseload and monitor such behavior is further reason not to find, against District's recommendation, that this matter should be excepted from the mootness doctrine as "capable of repetition, yet avoiding review." (*Roe v. Wade* (1973) 410 U.S. 113, 125.) Generally, the doctrine applies to cases that are "virtually impossible to litigate" because of the short duration of their effects. (*Weinstein v. Bradford* (1975) 423 U.S. 147, 149.) This is not such a matter.

ORDER

All relief sought by District is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the matter was found moot. Accordingly, there is no prevailing party.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: July 9, 2015

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings